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IN THE

Supreme Court of the United States

TRACY RAGSDALE, *et al.*,
Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women. The National Partnership for Women and Families (formerly the Women's Legal Defense Fund) is a nonprofit, nonpartisan organization that promotes, through public education and advocacy, fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The AFL-CIO and the National Partnership for Women and Families file this brief as *amicus curiae* in support of petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

The Family and Medical Leave Act (FMLA) requires covered employers to grant each eligible employee "a total of 12 work-weeks of leave [for four specified reasons] during any 12-month period," including leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1). A covered employer is one that employs 50 or more employees. 29 U.S.C. § 2611(4)(A). An "eligible employee" is, generally, someone employed at a worksite with 50 or more employees, who has worked for the

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

employer at least 12 months and has performed at least 1,250 hours of service during the 12 months prior to requesting leave. 29 U.S.C. § 2611(2)(A).

The issue in this case is whether Wolverine Worldwide, Inc. violated the FMLA when the Company denied Wolverine employee Tracy Ragsdale's September 26, 1996 request for FMLA medical leave.

On March 17, 1995, Ragsdale began employment with Wolverine. Pet. App. A2. In February 1996, eleven months later, Ragsdale was diagnosed with cancer, and on February 21, she requested a medical leave of absence. *Id.* Because she had worked for Wolverine for 11 months, and not the 12 months required to become an FMLA "eligible employee," 29 U.S.C. § 2611(2)(A)(i), Ragsdale did not qualify for FMLA leave as of the date of her request. Ragsdale did, however, qualify for "sick leave" under the terms of Wolverine's collective bargaining agreement with Local 2008 of the United Food & Commercial Workers International Union, AFL-CIO. *See* Answer to Second Amended Complaint ¶ 11. The agreement provided "sick leave" for employees with at least six months of Company service. *See* Pet. App. A2. And, Wolverine did grant Ragsdale "sick leave" under the Company's collectively bargained leave policy. *Id.*

Wolverine's "sick leave" policy provided for 30 days of leave and for up to six 30-day extensions, each available only upon a properly supported separate request. Pet. App. A2. On March 18, Ragsdale submitted her first request for an extension of her Company "sick leave." *Id.* While Ragsdale had been employed by Wolverine for 12 months as of March 17 and was thus eligible for FMLA leave, the Company treated her March 18 request for further medical leave as a request for Company "sick leave" and granted Ragsdale a second 30-day period of leave under the Company policy. *See* 29 C.F.R. § 825.110(b) (leave time during which

employee received either compensation or benefits counts toward the 12-month service requirement).

Ragsdale thereafter requested, and was granted, successive 30-day periods of leave under the Company "sick leave" policy on April 22, May 21, June 20, July 22, and August 15 of 1996. Pet. App. A2. Wolverine consistently treated Ragsdale's leave as Company "sick leave" and not as FMLA medical leave. Accordingly, Wolverine never designated Ragsdale's leave as FMLA leave in the Company's FMLA compliance records nor did the Company ever inform Ragsdale that her leave was FMLA leave counting against Ragsdale's 12-week leave entitlement under the FMLA.

Then, on September 20, Wolverine terminated Ragsdale's employment, because she had exhausted her Company "sick leave" and was still physically unable to return to work. Pet. App. A2. In response, Ragsdale requested further medical leave, expressly invoking the FMLA for the first time. Pet. App. A2. Wolverine denied this request for FMLA leave. *Id.* Ragsdale then requested that she be allowed to return to work on a reduced-hour schedule, but Wolverine denied this request as well. *Id.*

Ragsdale brought suit challenging, *inter alia*, Wolverine's denial of her September 26 request for FMLA medical leave as a violation of the Act. In the district court, Wolverine defended on the ground that Ragsdale was never entitled to FMLA leave, because she had only 11 months of service with Wolverine at the time her Company "sick leave" commenced. Pet. App. B4. The district court rejected this argument, concluding that Ragsdale's period of leave counted toward meeting the FMLA's 12-month service requirement. *Id.* at B5.[2]

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[2] Under Wolverine's leave policy, Ragsdale was maintained on the Company payroll and received medical benefits during her leave. Thus, under the Secretary of Labor's regulations, Ragsdale's leave time counted

The district court, nevertheless, dismissed Ragsdale's FMLA claim, holding that, as of September 26, Ragsdale had already received more than the 12 weeks of medical leave to which an employee is entitled under the FMLA. Pet. App. B8-B9. The Eighth Circuit affirmed the district court's legal conclusion and the dismissal of Ragsdale's FMLA claim. *Id.* at A11.

In dismissing Ragsdale's FMLA claim, the courts below invalidated a Department of Labor regulation that requires an employer to designate FMLA-qualifying leave as FMLA leave at the time the leave is granted and forbids an employer to count against an employee's 12-week FMLA leave entitlement any period of leave that the employer did not contemporaneously designate as FMLA leave. *See* Pet. App. A11 (declaring invalid the last sentence of 29 C.F.R. § 825.700(a)). Those courts held that the regulation was invalid, on the ground that it imposed "a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." *Id.* at A9.

SUMMARY OF ARGUMENT

The Family Medical Leave Act requires covered employers to provide qualified employees with a total of 12 weeks medical or family leave each year. The Act forbids employer interference with the exercise of FMLA rights as well as outright denial of such rights. The Secretary of Labor is charged with ensuring employer compliance with the FMLA and with seeking enforcement of the Act through administrative action or by bringing a civil action to redress violations. The FMLA authorizes the Secretary of Labor to issue regulations implementing both the substantive and the enforcement provisions of the Act.

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toward meeting the 12-month service requirement. 29 C.F.R. § 825.110(b).

Acting pursuant to her statutory authority, the Secretary of Labor has issued a comprehensive set of FMLA regulations. In delineating an employer's FMLA obligations, the Secretary has adopted regulations requiring employers to contemporaneously designate FMLA-qualifying leave as FMLA leave and to notify the employee of this designation. In this regard, the employer's FMLA designation of leave—and the attendant compliance records—must indicate whether the leave in question counts against the employee's 12-week FMLA annual leave entitlement and the employee must be so notified. If an employer fails to designate leave as FMLA leave and so notify the employee, the employer may not later count the leave against the employee's FMLA 12-week leave entitlement.

The contemporaneous-designation/notice-of-designation regulations reasonably implement the FMLA's prohibition of employer interference with employee FMLA rights. By requiring contemporaneous designation of leave by employers and forbidding after-the-fact recharacterization of leave, the regulations prevent employers from manipulating leave designations in a manner that interferes with the exercise of FMLA rights. In addition, by requiring employers to make accurate and reliable contemporaneous designations, to provide employees notice of the designations and to maintain compliance records of these designations and notices, the regulations implement the Act's record-keeping provisions in a manner that facilitates enforcement of the Act.

The regulation providing that, after the fact, an employer cannot count a period of leave not originally designated as FMLA leave against an employee's 12-week FMLA entitlement is integral to the set of contemporaneous-designation/notice-of-designation regulations. That regulation is proper and does not impose a penalty on employees or extend the FMLA leave entitlement beyond the statutory limits.

ARGUMENT

The Family and Medical Leave Act authorizes the Secretary of Labor to issue regulations implementing both the Act's substantive provisions and its enforcement provisions. 29 U.S.C. §§ 2616(b), 2619(a) & 2654. Acting pursuant to this grant of authority, the Secretary has issued a comprehensive set of regulations. 29 C.F.R. Part 825.

At issue in this case are the regulations issued by the Secretary defining the obligations of a covered employer upon receiving an FMLA-qualifying request for leave to contemporaneously designate the leave as FMLA leave, counting against the employee's 12-week annual entitlement, and to contemporaneously notify the employee of that designation. 29 C.F.R. §§ 825.208(a) & 825.301(b)(1). The particular aspect of the contemporaneous-designation/notice-of-designation regulations invalidated by the court below is the provision that an employer may not count any period of leave that the employer did not contemporaneously designate as FMLA leave against an employee's 12-week FMLA leave entitlement. 29 C.F.R. § 825.700(a). *See also* 29 CFR § 825.208(c).

The court of appeals acknowledged that the Secretary has authority to issue "regulations requiring employers to designate leave as FMLA leave" and that "[t]here are various situations in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights." Pet. App. A10. But the court below held that the regulation, by providing that an employer may not count undesignated leave against the employee's FMLA entitlement, imposes "a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." *Id.* at A9.

The lower court's ruling rests on a mischaracterization of the regulation at issue here as a penalty provision. What the regulations do is delineate the administrative steps an

employer must take to meet its obligation to grant eligible employees their FMLA leave entitlement and provide that an employer who does not take the steps of contemporaneously designating granted leave as FMLA leave and so notifying the employee may not later treat that leave as FMLA leave. These rules are not in any way punitive or unfair to the employer, who is only required to make a contemporaneous record designating grants of FMLA leave, to provide affected employees notice that the leave has been recorded as FMLA leave, and to base its calculation of an employee's remaining FMLA leave on the employer's own contemporaneous designation of the type of leave already granted. These rules further important statutory purposes in that they: (i) promote compliance with the Act by encouraging employers to accurately record leave as FMLA leave; (ii) prevent employer manipulations of leave designations that interfere with the ability of employees to exercise FMLA rights; and (iii) provide employees with reliable information on their FMLA leave status and entitlement. Contrary to the characterization of the courts below, the regulations do not provide employees more than their statutory entitlement of 12 weeks of FMLA leave within any 12-month period. Rather, the regulations estop an employer from changing its designation of leave already granted as the basis for denying what would otherwise be a valid request for FMLA leave.

In what follows, we first set out the pertinent statutory provisions. We then describe the interlocking set of regulations that provide the setting for the regulation invalidated by the court of appeals. After having placed the issue here in the proper statutory and regulatory context, we conclude by showing that the regulation in question is reasonably designed to implement the FMLA's statutory provisions.

I. **The FMLA Statutory Provisions.** At the core of the FMLA are the general leave requirements stated in Title I of

the Act. 29 U.S.C. §§ 2611-2619. The most basic of the FMLA leave requirements is that qualified employees of covered employers are entitled to a leave of absence from their employment for any one of four specified reasons, including "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," and that covered employers have a legal obligation to grant a proper request for such leave by a qualified employee. 29 U.S.C. § 2612(a)(1). The employer may require that a request for serious medical condition leave "be supported by a certification issued by the health care provider" of the employee or the relative for whom the employee seeks leave to care, but the statute defines what certification "shall be sufficient." 29 U.S.C. § 2613.

Generally, an employee is entitled to 12 weeks of leave under the statute in any given 12 month period. 29 U.S.C. § 2612(a). However, leave taken for a "serious health condition"—either of the employee or of a close relative for whom the employee is caring—"may be taken intermittently or on a reduced leave schedule when medically necessary," and when leave is taken intermittently or on a reduced schedule only "the amount of leave actually taken" may be counted against the employee's 12-week annual entitlement. 29 U.S.C. § 2612(b)(1).

The Act, in addition, provides for certain "employment and benefit protections" in connection with FMLA leave. *See* 29 U.S.C. § 2614. The employer must "maintain coverage [of any employee on FMLA leave] under any 'group health care plan' (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." 29 U.S.C. § 2614(c)(1). And, upon return from FMLA leave, an employee is entitled to "be restored . . . to the position of employment held by the employee when the

leave commenced" or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1). "The taking of leave under [the FMLA] shall not result in the loss of any employment benefit accrued to the date on which the leave commenced." 29 U.S.C. § 2614(a)(2).

FMLA leave "may be provided without compensation." 29 U.S.C. § 2612(c). At the same time, "[a]n eligible employee may elect, or an employer may require the employee, to substitute" various sorts of "accrued paid leave"—such as vacation leave, personal leave, family leave, medical leave or sick leave—"for any part of the 12-week period of such leave under [the FMLA]." 29 U.S.C. § 2612(2).

The Act expressly contemplates that employers may have policies or plans providing employees with leave that supplements or coincides with FMLA leave. In this regard, the FMLA provides *both* that the Act shall not be "construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act," 29 U.S.C. § 2652(a), *and* that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan," 29 U.S.C. § 2652(b).

Section 105 of the Act, in its turn, defines certain "prohibited acts." 29 U.S.C. § 2615. This section makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [Title I of the FMLA]." 29 U.S.C. § 2615(a). Any covered employer who "interefere[s] with, restrain[s], or den[ies] the exercise" of rights under the FMLA's general leave provisions is subject to a civil action brought by an employee and an award of damages in the amount of lost "wages, salary, employment benefits, or other compensation"

and "equitable relief . . . including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a).

In order "[t]o ensure compliance" with the Act's general leave provisions, the FMLA grants the Secretary of Labor broad "investigative authority." 29 U.S.C. § 2616(a). To assist the Secretary in exercising her investigative authority, employers are required to "make, keep, and preserve records pertaining to compliance with [the Act's general leave provisions] . . . in accordance with regulations issued by the Secretary." 29 U.S.C. § 2616(b). The Secretary may require an employer to submit these records for inspection once each year. 29 U.S.C. § 2616(c). In addition, the Secretary may require an employer to submit its records more frequently where she "has reasonable cause to believe there may exist a violation of [the FMLA general leave provisions] or any regulation or order issued pursuant to [those provisions]." 29 U.S.C. § 2616(c).

The Act further directs the Secretary to "receive, investigate, and attempt to resolve complaints of violations [of the FMLA general leave provisions]." 29 U.S.C. § 2617(b)(1). When the Secretary "is investigating a charge" alleging such violations, she may order the employer to submit its compliance records to her for inspection. 29 U.S.C. § 2616(c).

If the Secretary concludes that an employer has violated the FMLA general leave provisions, she may bring a civil action to recover damages on behalf of the injured employees. 29 U.S.C. § 2617(b)(2). In addition, the Secretary may seek injunctive relief restraining interference with or denial of any rights granted by the FMLA general leave provisions and ordering employment, reinstatement or promotion of affected employees. 29 U.S.C. § 2617(d).

II. **The Secretary of Labor's FMLA Regulations.** The FMLA directs the Secretary of Labor to "prescribe such

regulations as are necessary to carry out" both the general leave provisions contained in Title I of the Act and the provisions addressed to the effect of other employer leave policies on FMLA leave contained in Title IV. 29 U.S.C. § 2654. The FMLA further provides that the employer obligation to "make, keep, and preserve records pertaining to compliance" shall be carried out "in accordance with regulations issued by the Secretary." 29 U.S.C. § 2616(b). The contemporaneous-designation/notice-of-designation regulations at issue here were promulgated by the Secretary pursuant to these statutory grants of authority.

A. The FMLA regulation invalidated by the court is contained in the subpart of the regulations addressing "how do other . . . employer practices . . . affect employee rights under FMLA?" 29 C.F.R. Part 825, Subpart G, reads, in pertinent part, as follows:

> "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). [3]

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[3] A similar rule also appears in the subpart of the regulations addressing "What leave is an employee entitled to take?" 29 C.F.R. Part 825, Subpart B. Section 825.208 of that subpart addresses generally "[u]nder what circumstances may an employer designate leave, paid or unpaid, as FMLA and, as a result, count it against the employee's total FMLA leave entitlement?" Answering this question, paragraph (c) of this section provides:

> "If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the

B. The employer obligations to contemporaneously designate leave as FMLA leave and to inform the employee of the designation that form the basis for § 825.700(a) are stated in several FMLA regulations.

Section 825.208 (a) of the regulations provides that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying." Likewise, the regulations describing "what records must be kept to comply with the FMLA," 29 C.F.R. Part 825, Subpart E, require that qualifying "[l]eave must be designated in [the employer's] records as FMLA leave." 29 C.F.R. § 825.500(c)(2). In this regard, the regulations specify that the employer's "records . . . must disclose . . . [d]ates FMLA leave is taken by FMLA eligible employees." *Id.*

In addition to providing that "it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying," the regulations also require the employer "to give notice of the designation to the employee." 29 C.F.R. § 825.208 (a). In meeting the obligation to notify an employee of the leave's designation, an employer is specifically required to state whether "the leave will be counted against the employee's annual FMLA leave entitlement." 29 C.F.R. § 825.301(b)(1)(i). *See id.* (cross-referencing § 825.208). "The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing," but, "[i]f the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday)." 29 C.F.R. § 825.208 (b)(2). This notice must be given to the employee at the time of the leave

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notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement." 29 C.F.R. § 825.208(c).

request, unless a notice containing the same information has been given to the employee within sixty days. 29 C.F.R. § 825.301(c).

The regulations require employers to keep, as part of their FMLA compliance records, "[c]opies of all . . . specific written notices given to employees as required under . . . § 825.301(b)," including the notices sent to employees who have requested leave informing them of whether the leave counts against the 12-week FMLA entitlement. 29 C.F.R. § 825.500(c)(4). Employers are also required to keep "[r]ecords of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement." 29 C.F.R. § 825.500(c)(7).

To facilitate employer compliance, the regulations set out a "Prototype Notice: Employer Response to Employee Request for Family and Medical Leave," 29 C.F.R. App. D, that employers may use "to meet the[] specific notice requirements of the regulations," 29 C.F.R. § 825.301(b)(2). The Prototype Notice provides spaces where the employer can indicate, by checking various boxes, both the FMLA-qualifying basis for the leave and whether "[t]he requested leave □ will [or] □ will not be counted against [the employee's] annual FMLA leave requirement." 29 C.F.R. App. D. In addition, the Prototype Notice calls on the employer to specify the beginning and ending dates of the leave and whether, in the case of leave due to a serious health condition, medical certification will be required. *Id.*

III. **The FMLA Regulation At Issue Here Is Proper.** The FMLA contemporaneous-designation/notice-of-designation regulations state a reasonable means of implementing the Act's leave provisions that serve to assure against employer "interfere[nce] with . . . the exercise of . . . any right provided under th[e Act,]" 29 U.S.C. § 2615(a), through manipulation

of the employer's non-statutory leave policies in a manner that "diminishe[s]" any of "[t]he rights established for employees under th[e] Act," 29 U.S.C. § 2652(b). Those regulations, by specifying what an employer is required to do in "mak[ing], keep[ing], and preserv[ing leave designation] records pertaining to compliance," 29 U.S.C. § 2616(b), also serve as a reasonable means of implementing the statutory provisions charging the Secretary with "ensur[ing] compliance with the provisions of the [Act]" and providing her with "investigative authority." 29 U.S.C. § 2616(a). And, contrary to the court of appeals' view, these regulations are not subject to the objection that they provide employees with more than the statutory entitlement of 12 weeks of FMLA leave within any 12-month period.

A. The FMLA recognizes that covered employers may have company leave policies that provide for employee leave that differs from the employee leave entitlement provided for by the FMLA. In that regard, the Act provides for the coexistence of the two types of leave by stating that "[n]othing in this Act . . . shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the right established under this Act," and that "[t]he rights established under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. § 2652.

The Act also forbids "any employer . . . interfere[nce] with . . . the exercise of or the attempt to exercise, any [FMLA] right." 29 U.S.C. § 2615. And, "'[i]nterfering with' the exercise of an employee's rights would include manipulation by a covered employer to avoid responsibilities under FMLA. . . ." 29 C.F.R. § 825.220(b).

Against this background, proper implementation of the Act requires rules delineating which grants of leave are to be

regarded as grants of company policy leave, which are grants of FMLA leave, and which are grants of leave under both the FMLA and a parallel company leave policy and the FMLA. Not least of all, proper implementation of the Act requires such rules to assure against "manipulation" by which a covered employer might seek to "avoid responsibilities under [the] FMLA," 29 C.F.R. § 825.220(b), by first opportunistically designating leave as company policy leave and then later redesignating it as FMLA leave.

That being so, in adopting the regulations at issue here, the Secretary pointed to the need "to eliminate protracted 'after the fact' disputes" by "resolving the question of FMLA designation as early as possible in the leave request process." 60 Fed. Reg. 2180, 2207 (1995). Providing for the proper designation of leave early and eliminating after-the-fact redesignations—as mandated by the regulations—requires an employer to responsibly designate leave at the time it is taken and precludes an employer from making opportunistic redesignations at a later time.

The basic point attended to by the regulation is this: an employer's initial designation of an employee's leave as company policy leave rather than FMLA leave, followed by after-the-fact redesignation of the leave as FMLA leave, interferes with the exercise of rights under the FMLA—and thus diminishes those rights—because the Act guarantees employees more than simply time off from work: the FMLA guarantees leave under certain specified conditions and with certain specified protections.

In the first place, employees on FMLA leave—but not employees on company policy leave—are entitled by the Act to: guaranteed use of accrued paid leave, such as earned paid vacation days, for FMLA leave; a guaranteed job upon expiration of the leave; a guarantee against reduction of any benefits for having taken the leave; and a guarantee of continued health care coverage during the period of the leave.

29 U.S.C. § 2614 ("Employment and benefits protection"). An employee placed on company policy leave has no basis for believing that these guarantees apply to her and no basis for demanding these employment and benefits protections.

The FMLA also guarantees that an employee can take just so much leave as she needs to attend to a serious medical condition. Thus, FMLA medical leave can be taken on an intermittent or a reduced schedule basis and does not have to be taken in whole day or whole week increments. 29 U.S.C. § 2612(b)(1). These options can effectively extend the total period during which leave is taken, because only the time actually away from work is counted against the 12-week FMLA entitlement. 29 U.S.C. § 2612(b)(1). The Secretary of Labor has noted that cancer victims, such as Ragsdale, are particularly likely to invoke one of these options in order to cope with the effects of chemotherapy. 29 C.F.R. § 825.203(c)(1).

Finally, employees on FMLA leave cannot be required to comply with employer extension requirements going beyond the prerequisites for leave specified in the statute. In particular, an employee on FMLA leave cannot be required to request continuation of her leave in the 30-day increments provided for by Wolverine's leave policy. *See* 29 C.F.R. § 825.308(b)(1).

Absent the contemporaneous-designation/notice-of-designation requirements, employers could easily manipulate the co-existence of two sources of similar medical leave—each entailing different employer obligations and different employee rights—in a manner that interferes with the exercise of FMLA rights. Employers have every incentive to respond to an FMLA-qualifying leave request by initially characterizing the grant of leave as employer policy leave—which does not carry any of the FMLA protections or guarantees—and not FMLA leave—which does. Where an employer so characterizes a grant of leave, the employee,

faced with the risk that her employment might be adversely affected by taking leave, may choose to keep working after all, or she may forego one or more of the statutory rights just outlined in connection with whatever leave is taken. And, where the employee does take leave, the employer would be free to later change the leave's characterization by designating it FMLA leave—after the employee has forgone her statutory rights—and deny a later leave request on the ground that the leave previously granted and taken was in fact FMLA leave that counted against the employee's 12-week entitlement. The Secretary's regulations implement the Act by mandating that employers take designation actions that preclude these adverse possibilities.

B. The contemporaneous-designation/notice-of-designation regulations are, moreover, a proper exercise of the Secretary's authority to issue regulations defining a covered employer's obligation to "make, keep, and preserve records pertaining to compliance with th[e FMLA]." 29 U.S.C. § 2616 (b).

The most basic record of "compliance with th[e FMLA]" is a record showing what FMLA leave has been granted and for what periods of time. A necessary part of any such record is a designation by the employer of whether the leave being recorded was treated as FMLA leave and whether the leave counts against an employee's 12-week annual leave entitlement.

The requirement that the employer notify the employee of the designation recorded in the employer's records—together with the closely related requirement that the notice be maintained in the employer's compliance records along with any correspondence related to a dispute over the designation, 29 C.F.R. § 825.500(c)(7)—is also related to the exercise of the Secretary's "investigative authority" in the service of "ensur[ing] compliance with the provisions of th[e Act]," 29 U.S.C. § 2616(a). Absent such notice, an employee could not be expected to raise any question of the employer's compliance with the Act or to take any action to assert her rights under the Act. *See* 29 U.S.C. § 2617(b)(1).

The statute assigns to the Secretary the task of inspecting these records to ensure that employers are in compliance with the FMLA leave requirements. 29 U.S.C. § 2616(c). And, the Secretary may bring an enforcement action in court based on violations uncovered through such inspections. 29 U.S.C. § 2617 (b), (d) & (e). The employer compliance records would be of little utility in this regard if employers were free to change their leave designations after a violation was discovered by the Secretary in inspecting the original records. Were that allowed, employers could confound the Secretary's enforcement efforts by changing their records to recharacterize leave in response to any determination that leave had been incorrectly treated as not FMLA-qualifying.

C. The particular regulatory provision invalidated by the courts below—the provision prohibiting employers from counting against an employee's 12-week FMLA leave entitlement any period of leave that the employer failed to contemporaneously designate as FMLA leave—is integral to the set of contemporaneous-designation/notice-of-designation regulations. The point of those regulations is to prompt employers to designate FMLA leave as such at the time the leave is granted—and to notify the employee of the designation—in the interests of preventing after-the-fact disputes on the nature of the leave and preventing employer manipulations that interfere with the exercise of employee rights under the Act. Permitting an employer to treat a grant of leave—that the employer had originally characterized as company policy leave—as FMLA leave that counts against the 12-week FMLA entitlement after-the-fact would run directly contrary to the logic of the regulations and would frustrate their purpose.

This is most easily demonstrated by considering the two possible alternatives to the Secretary's rule: (i) allowing an employer who at the time fails to designate a grant of leave as FMLA leave to always count that leave against the

employee's 12-week FMLA entitlement; or (ii) forbidding an employer to count leave not originally designated as FMLA leave *only* where it can be shown that the failure to designate resulted in concrete harm to the employee in question.

The first alternative would provide *no* incentive for an employer to comply with the contemporaneous-designation/notice-of-designation regulations and *no* protection to employees against employer manipulation of leave designations.

The second alternative would provide only a marginal incentive for employer compliance with the contemporaneous-designation/notice-of-designation regulations and only the most tenuous protection against employer manipulation of leave characterizations. Under this alternative, the employee would be required to prove a material detriment caused by the employer's failure to make a contemporaneous FMLA designation in order to claim the FMLA leave due to her by the employer's own records; proving such a detriment, after the events in question have occurred, would at least be difficult and more probably be all but impossible.

Both of the alternatives are thus clearly inferior to the categorical rule—adopted by the Secretary in the exercise of sound regulatory judgment—that more fully protects the rights granted by the Act and provides a greater incentive for accurate compliance record-keeping by employers.

D. Contrary to the courts below, the provision forbidding an employer from counting undesignated leave against an employee's 12-week entitlement does not result in an employee receiving more than 12 weeks of FMLA leave within any 12-month period. What the regulation does is allow an employee to rely on her employer's original characterization of leave as company policy leave or FMLA leave as the starting point in determining how much FMLA leave time she left has to draw upon.

The instant case demonstrates this point well. Ragsdale's claim is that, on September 26, 1996, she should have been given the 12 weeks of FMLA leave that she was due on the understanding—expressed by Wolverine, accepted by Ragsdale, and reflected in the Company's own compliance records—that up until that time she had not been granted, and thus had not exhausted, any of her 12-week annual FMLA leave entitlement. Ragsdale has *not* sought an order *re*designating any of the Company leave she had been granted to that point as FMLA leave. Nor has Ragsdale sought any substantive relief that would effectively turn any portion of the prior leave into FMLA leave. Thus, granting Ragsdale's claim would *not* result in her receiving leave under the FMLA for more than 12 weeks.

CONCLUSION

The judgment of the courts below should be reversed.

Respectfully submitted,

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